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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 153.

THE UNITED STATES, APPELLANTS,

vs.

SANFORD PERRYMAN.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 25, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 153.

THE UNITED STATES, APPELLANTS,

vs.

SANFORD PERRYMAN.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the United States Court of Claims.

SANFORD PERRYMAN
vs.
UNITED STATES. } No. 10725. Filed Nov. 29th, 1875.—J. R.

To the Court of Claims of the United States, Washington, D. C.:

In reclaim of Sanford Perryman.

Your petitioner respectfully shows that he is a friendly Indian, and a member of the Creek tribe of Indians, and a resident of the Creek Nation; that his post-office address is Muscogee, I. T., and that of his attorneys, Washington, D. C. That he has a claim against the United States, founded upon the sixty-sixth section of the act of Congress, entitled an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved June 30th, A. D. 1834, and re-enacted in the Revised Statutes, sections 2154 and 2155 et seq., for property stolen from him on or about the 18th day of December, A. D. 1874, in the Creek Nation, Indian country, in the western district of Arkansas, by Henry Carter and John Conner, white men, which property is, and was at the time it was stolen, as follows, to wit: Twenty-three head of beef cattle, each of which are and were of the value
2 of fifteen dollars. Total value, three hundred and forty-five dollars ($345.00).

That neither your petitioner nor any of the tribe or nation to which he belongs have sought private revenge, or attempted to obtain satisfaction by any force or violence; that your petitioner appeared before the grand jury of the United States for the western district of Arkansas, at the May term of said court, A. D. 1875, and upon his evidence and that of Charles Roberts and Caroline Grayson, the said grand jury found an indictment against said offenders of said larceny, as will appear by reference to a duly authenticated copy of said indictment, and the indorsements thereon, hereto appended, marked Exhibit A.

That afterwards, on the day of , A. D. 1875, one of said offenders was arrested by the United States marshal, and on the 15th day of May, A. D. 1875, the said Henry Carter, one of said offenders, was tried in the district court of the United States for the western district of Arkansas, and convicted of said crime of larceny, as charged in the said indictment, as will more fully appear by reference to a duly authenticated copy of the record and proceedings of said court had in said cause, hereto appended, marked Exhibit B. That said Henry Carter was the only one of said offenders who was or could be apprehended and brought to trial. That the other offender, John Conner, fled the country soon after the commission of said offense, and could not be arrested or brought to trial. Thereafter, to wit, at the May term of said court, the said Henry Carter was, upon the verdict of guilty, heretobefore returned against him by the jury in this cause, sentenced by the court for his felony aforesaid, to be imprisoned in the penitentiary of the State of Arkansas, situated at Little Rock, in the eastern district of Arkansas, at hard labor for the term and period of one year; and that he pay to Sanford Perryman, an Indian, from whom the property was stolen, a fine of four hundred and fifty ($450) dollars, it be-
3 ing double the value of fifteen head of cattle at fifteen dollars per head, the amount of property proven to have been stolen, and that he have execution therefor.

That thereafter, to wit, on the 8th day of July, A. D. 1875, your petitioner caused an execution to be duly issued out of said court and placed in the hands of James F. Fagan, United States marshal for the said district, who, on the 7th day of September, A. D. 1875, returned said execution, endorsed as follows, to wit:

U. S. MARSHAL'S OFFICE,
WEST. DIST. OF ARK.,
Fort Smith, Sept. 7, 1875.

I certify that no property can be found within the limits of this district whereon to levy the within execution.

J. F. FAGAN,
U. S. Marshal,
By HUGH McGUIRE.
Deputy.

All of which will more fully appear by reference to a duly authenticated copy of the execution and return thereon herewith appended, marked Exhibit C.

That said offender, Henry Carter, is unable to pay the amount of said fine and judgment, or any part thereof.

Therefore, your petitioner prays judgment for three hundred and forty-five (345) dollars, the value of the property stolen as aforesaid, and for such other relief as may be deemed just and proper in the premises.

UNITED STATES OF AMERICA,
Western District of Arkansas:

Sanford Perryman, being duly sworn, deposes and says, that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made by him to any one.

4 That he is justly entitled to the amount therein claimed to be due him from the United States, after allowing all just credits and set-offs, and that the facts as stated in the foregoing petition are true.

SANFORD PERRYMAN.

R. S. DAVIS,
J. S. GAGE,
Attorneys for Claimant.

Sworn to before me and subscribed in my presence this twentieth day of November, A. D. 1875.

[L. S.] STEPHEN WHEELER, *Clerk.*

EXHIBIT A.

UNITED STATES OF AMERICA,
Western District of Arkansas:

In the district court of the United States of America for the western district of Arkansas, May term, A. D. 1874.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That Henry Carter, a negro, and not an Indian, and one John Con-

nor, a white man, and not an Indian, on the 18th day of December, A. D. 1874, at the Creek Nation, in the Indian country, within the western district of Arkansas aforesaid, did feloniously steal, take, and carry away, of the goods and chattels of Sanford Perryman, twenty-three head of beef cattle, of the value of fifteen dollars each, and of the total value of three hundred and forty-five dollars, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WM. H. H. CLAYTON,
U. S. District Att'y, West. Dist. of Ark.

(Endorsed:) No. 127. United States *vs.* Henry Carter and John Connor. Larceny. A true bill. John Carrol, foreman. Witnesses: Charles Roberts, Carolina Grayson, Sanford W. Perryman. Filed May 13, 1875. James O. Churchhill, clerk.

We, the jury, find the within named defendant, Henry Carter, guilty of larceny, in manner and form as charged in the within indictment.

S. A. WILLIAMS,
Foreman.

In the district court of the United States for the western district of Arkansas.

EXHIBIT B.

May term, A. D. 1875.

UNITED STATES *vs.* HENRY CARTER. } No. 127. Indictment for larceny.

Now, on this day, come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and said defendant, in his own proper person, in custody of the marshal of said district, and by his attorneys, Messrs. Marcum & Barnes, and having had hearing of said indictment, and it further being demanded of them concerning said indictment, above specified, and charged upon him how he would acquit himself thereof, he saith he is not guilty, and puts himself upon the country.

* * * * * * *

6 UNITED STATES *vs.* HENRY CARTER AND JNO. CONNOR. } No. 127. Indictment for larceny.

Now, on this day, comes the United States of America, by Wm. H. H. Clayton, esq, attorney for the western district of Arkansas, and make known to the court here that they are unwilling to prosecute said indictment against the said defendant John Connor, and, with the consent of the court, elect to take a nolle prosequi therein; whereupon, the premises being seen, and by the court well and sufficiently understood, it is ordered that said defendant, John Connor, be discharged of and from said indictment.

Whereupon comes the said defendant, Henry Carter, in his own proper person, in custody of the marshal of said district, and by his attorneys, Messrs. Marcum & Barnes, and having at a previous day of the present

term of this court been arraigned and had hearing of said indictment and pleaded not guilty thereto, on motion of Wm. H. H. Clayton, esq., it is ordered that a jury come to try the issue joined; whereupon James F. Fagan, esq., marshal of said district, returned into court here the following named persons, to wit, Samuel A. William, Thomas W. Abbot, Thomas M. Gerrin, William H. Green, Davidson Dixon, John Nelson, Robert Trotter, Edgar C. Dechard, Richard H. Sheldon, Samuel Burchet, William P. Scott, and Jackson Mileham, twelve good and lawful men of the district aforesaid, who being duly elected, empaneled and sworn to well and truly try the issue joined, and a true verdict render according to the law and evidence, after hearing the evidence, argument of counsel, and charge of the court, retired to consider of their verdict, and afterwards on the same day returned into court here the following verdict, to wit: "We, the jury, find the defendant, Henry Carter, guilty of larceny as charged in the indictment."

7 Whereupon the said defendant, Henry Carter, was remanded to the custody of the marshal to await final sentence.

* * * * * * *

UNITED STATES vs. HENRY CARTER. } No. 127. Indictment for larceny.

On motion of Wm. H. Clayton, esq., attorney for the western district of Arkansas, the said defendant, Henry Carter, was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty, heretofore rendered against him by the jury in this cause, on the 15th day of May, A. D. 1875, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon the premises being seen, and by the court well and sufficiently understood, it is considered by the court here that the said Henry Carter for his felony aforesaid be imprisoned in the penitentiary of the State of Arkansas, situated at Little Rock, in the eastern district of Arkansas, at hard labor for the term and period of one year; and that he pay to Sanford Perryman, an Indian, from whom the property was stolen, a fine of four hundred and fifty dollars, it being double the value of fifteen head of cattle at fifteen dollars per head, the amount of property proven to have been stolen, and that he have execution therefor, and to the United States all their costs in and about this prosecution laid out and expended, and that they have execution therefor.

And the marshal of the western district of Arkansas, to whose custody the said Henry Carter is now here committed, is hereby required to receive and safely keep and convey the body of said Henry Carter

8 hence to said penitentiary of the State of Arkansas without delay and deliver him to the custody of the keeper of said penitentiary, who is hereby required to receive and safely keep the said Henry Carter in jail in execution of the sentence aforesaid, and in conformity with the same, for the full period of time aforesaid, and the clerk of this court is hereby required to furnish the marshal of this district with two duly certified copies of this judgment, sentence, and order, one of which shall be delivered to the keeper of said penitentiary, and the other returned by the marshal to this court with a full and true account of the execution of the same.

Upon which the following execution issued:

EXHIBIT C.

UNITED STATES OF AMERICA,
Western District of Arkansas, ss:

In the district court of the United States for the western district of Arkansas.

The President of the United States, to the marshal of the western district of Arkansas, greeting:

You are commanded that of the estate of Henry Carter, you cause to be made the sum of four hundred and fifty dollars, which Sanford Perryman, late in our court, recovered against him for damages, with interest thereon from the 17th day of May, 1875, until paid; and that you have said sums of money within sixty days to render to the said Sanford Perryman.

In witness whereof the honorable Isaac C. Parker, judge of the said district court, has caused the seal of said court to be hereunto affixed this 8th day of July, A. D. 1875, and of our Independence the 100th.

[L. S.] STEPHEN WHEELER, *Clerk.*

And is indorsed as follows: 28. Sanford Perryman vs. Henry
9 Carter. Execution issued July 8, 1875. U. S. marshal's office, west. dist. of Arkansas, Fort Smith, Sept. 7, 1875. I certify that no property can be found within the limits of this district, whereon to levy the within execution. J. F. Fagan, U. S. marshal, by Hugh McGuire, deputy.

UNITED STATES OF AMERICA,
Western District of Arkansas, ss:

I, Stephen Wheeler, clerk of the district court of the United States for the western district of Arkansas, hereby certify that the above and foregoing contains a true and correct copy of the indictment, with indorsements, arraignment, trial and verdict, and judgment and sentence, and execution in favor of Sanford Perryman, with the return of the marshal thereon, in the case of the United States vs. Henry Carter, indicted for larceny, as the same appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 14th day of October, A. D. 1875.

[L. S.] STEPHEN WHEELER, *Clerk.*

10 In the Court of Claims of the United States, December term, A. D. 1875.

SANFORD PERRYMAN
vs.
THE UNITED STATES. } No. 10725.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of three

hundred and forty-five dollars, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

THOMAS SIMONS,
Assistant Attorney-General.

Filed Dec. 8, 1875.

11 In the Court of Claims.

SANFORD PERRYMAN
vs.
THE UNITED STATES. } 10725.

At a Court of Claims held at the Capitol in the city of Washington, on the 26th day of February, A. D. 1877, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Sanford Perryman, claimant, do have and recover of and from the United States the sum of three hundred and forty-five dollars.

($345\frac{00}{100}$.)

By the court.

A true copy of record.

12 In the Court of Claims of the United States, Dec. term, 1876.

SANFORD PERRYMAN
vs.
THE UNITED STATES. } No. 10725.

From the judgment rendered in the above-entitled cause on the 26th February, 1877, in favor of claimant, the defendants, by their Attorney-General, on the 22nd day of May, 1877, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney-General.

Filed May 23, 1877.

Ordered, That the appeal be allowed as prayed for.

By the court.

13 Court of Claims.

SANFORD PERRYMAN
vs.
THE UNITED STATES. } No.

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

That the petitioner is a Creek Indian, and on the 18th of December, 1864, was residing in Cowetah district of the Creek Nation, within the western district of Arkansas.

That on said 18th of December, Henry Carter, a negro, and not an Indian, and one John Conner, a white man, at the Creek Nation, within said western district of Arkansas, took, stole, and carried away twenty-three head of beef cattle, of the value of $15 each, and of the total value of $345, then and there being the property of the petitioner.

That thereafter, and in the May term of the district court of the United States of America for the western district of Arkansas, the said Henry Carter and John Conner were indicted for said larceny; and the said John Conner, on an entry of nolle prosequi, was discharged from said indictment; and the same was prosecuted against said Carter, and he was found guilty of said larceny, and sentenced to imprisonment in the penitentiary of the State of Arkansas, situated at Little Rock. And it was further adjudged that he pay to said petitioner, from whom the property was stolen, a fine of $450—it being double the value of fifteen head of cattle at $15 per head, the amount of property proven to be stolen—and that said petitioner have execution therefor.

And afterward, to wit, on the 8th July, 1874, execution was duly issued from said court to the marshal of said district to cause the sum of $450 which said petitioner had recovered, with interest from the 17th May, 1875, until paid, to be made of the estate of said Carter. And said execution was afterward, to wit, on September 7, 1875, returned to said court by said marshal with his certificate indorsed thereon, "That no property could be found within the limits of said district whereon to levy said execution."

And the petitioner was a witness and testified in said cause before the grand jury and at its final trial in said court.

It did not appear that the petitioner, or any of the nation to which he belonged, had sought private revenge, or had attempted to obtain satisfaction by force or violence.

Upon the foregoing facts the court are divided upon the question whether the defendants are liable in such case for a theft committed by a negro; and thereupon, in order to allow an appeal, this court renders a judgment pro forma in favor of the claimant for $345.

14 *Upon the foregoing facts the court are divided upon the question whether the defendants are liable in such case for a theft committed by a negro; and thereupon, in order to allow an appeal, the court renders a judgment pro forma in favor of claimant for $345.*

By the court.

15 In the Court of Claims.

SANDFORD PERRYMAN
vs.
THE UNITED STATES. } No. 10725.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the Attorney-General, for the defendants, for the allowance of an appeal, as filed in the clerk's office May 23, 1877, and of the order of the Court of Claims allowing the same, of the findings of fact by the court and the conclusion of law thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this twenty-second day of June, A. D. 1877.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 153. The United States, appellant, vs. Sanford Perryman. Court of Claims. Filed 25th June, 1877.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

APPEAL FROM THE COURT OF CLAIMS.

THE UNITED STATES
v.
SANFORD PERRYMAN. } No. 153.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

APPEAL FROM THE COURT OF CLAIMS.

THE UNITED STATES
v.
SANFORD PERRYMAN. } No. 153.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The simple question here raised is this: Is a negro a white person?

This case having been heard before the Court of Claims, the court, upon the evidence, found the facts to be as follows:

That the petitioner is a Creek Indian, and on the 18th of December, 1864, was residing in Cowetah district of the Creek Nation, within the western district of Arkansas.

That on said 18th of December Henry Carter, a negro, and not an Indian, and one John Conner, a white man, at the Creek Nation, within said western district of Arkansas, took, stole, and carried away twenty-three head of beef cattle, of the value of $15 each, and of the total value of $345, then and there being the property of the petitioner.

That thereafter, and in the May term of the district court of the United States of America for the western district of Arkansas, the said Henry Carter and John Conner were indicted for said larceny; and the said John Conner, on an entry of *nolle prosequi*, was discharged from said indictment; and the same was prosecuted against said Carter, and he was found guilty of said larceny, and sentenced to imprisonment in the penitentiary of the State of Arkansas, situated at Little Rock. And it was further adjudged that he pay to said petitioner, from whom the property was stolen, a fine of $450—it being double the value of fifteen head of cattle at $15 per head, the amount of property proven to be stolen—and that said petitioner have execution therefor.

And afterward, to wit, on the 8th July, 1874, execution was duly issued from said court to the marshal of said district to cause the sum of $450 which said petitioner had recovered, with interest from the 17th May, 1875, until paid, to be made of the estate of said Carter. And said execution was afterward, to wit, on September 7, 1875, returned to said court by said marshal with his certificate indorsed thereon, "That no property could be found within the limits of said district whereon to levy said execution."

And the petitioner was a witness and testified in said cause before the grand jury and at its final trial in said court.

It did not appear that the petitioner, or any of the nation to which he belonged, had sought private revenge, or had attempted to obtain satisfaction by force or violence.

Upon the foregoing facts the court are divided upon the question whether the defendants are liable in such case for a theft committed by a negro; and thereupon, in order to allow an appeal, this court renders a judgment *pro forma* in favor of the claimant for $345. (Record, 7.)

STATUTE.

The statutes applicable to this case are these two sections of the Revised Statutes, reproduced from the act of June 20, 1834, chap. 161, § 16, 4 Stats., 731. The only change in the revision is to strike out the word "and" and to break the section into these two:

"SEC. 2154. Whenever, in the commission, by a white person, of any crime, offense, or misdemeanor, within the Indian country, the property of any friendly Indian is taken, injured or destroyed and a conviction is had for such crime, offense, or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed.

"SEC. 2155. If such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the Treasury of the United States. If such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the Treasury. But no Indian shall be entitled to any payment out of the Treasury of the United States, for any such property, if he, or any of the nation to which he belongs, have sought private revenge or have attempted to obtain satisfaction by any force or violence."—(Rev. Stat., secs. 2154 and 2155.)

ASSIGNMENT OF ERROR.

The court erred in giving judgment against the United States, under the foregoing statute, for a theft committed by a negro from a member of the Creek Tribe of Indians in the Creek Nation. (Record, 6, folio 11,7.)

BRIEF.

I.

In the statement of the case, it is said that the sections of the Revised Statutes 2154–5 are reproductions of the act of June 30, 1834, c. 161, § 16, in force when the cause of action accrued. This provision of law originated, however, in a much earlier statute. Its first appearance, so far as we are able to discover, is in the fourth section of the act of May 19, 1796. (1 Stats., 470, § 4.)

The second section of this act (*ib.*, top) forbids "any citizen of, or *other person resident in*, the United States" going over the boundary line of the Indian country, as defined in the first section, to hunt or fish, &c. The next (third) section imposes a forfeiture upon "any *such* citizen or other person" who shall go into the country of the Indians south of the Ohio without a passport. The fourth section declares "that if any *such* citizen or other person, shall go into any town, settlement, or territory belonging or secured by treaty with the United States to any nation or tribe of Indians, and shall there commit robbery, larcency, trespass, or other crime against the person or property of any friendly Indian or Indians," he shall be punished as therein provided, and also pay double the value of the property taken or destroyed; concluding with the clause that if the offender cannot pay a sum at least equal to the value of the property, the deficiency shall be paid out of the Treasury of the United States, if there has been no attempt at revenge

or forcible satisfaction. (1 Stats., 470, § 4.) The four teenth section of this act contained the correlative provision that if any Indian crossed into the neighboring State or Territory to take or destroy the property of "any citizen *or inhabitant* of the United States," reclamation would be made upon the nation or tribe to which the offender belonged, and in the mean time would guarantee to the injured party eventual indemnification, if he had not sought private satisfaction or revenge. (1 Stats., 472, § 14.) That act was, by its concluding section, limited to two years duration. (1 Stats., 474, § 22.)

March 3, 1799, another similar statute, to be in force three years, was approved, its second, third, fourth, and fourteenth sections being identical in phraseology with the same numbered sections of the prior act, as above quoted. (1 Stats., 744, §§ 2, 3, 4; p. 747, § 14, and p. 749, § 21.) This enactment was revived and continued in force till March 3, 1802, by act of January 17, 1800. (2 Stats., 6, 7, § 5.)

Upon the 30th day of March, 1802, Congress, by the first section of an act of that date, again defined and relocated the boundary of the Indian country. Its second, third, fourth, and fourteenth sections were again couched in the language of the same sections of the earlier laws. (2 Stats., 141, §§ 2, 3, 4; p. 143, § 14.) It does not appear to have been limited in its duration. (2 Stats., 146, § 22.)

By the act of June 30, 1834, c. 161, § 1 (4 Stats., 729), a brief definition, in half a dozen lines, is given of what shall be deemed Indian country. The essential difference between this and former legislation in this respect is that whereas theretofore the boundary-line had been

carefully run through the States so as to include the settlements of the Indians east of the Mississippi, it is now declared that, east of the Mississippi, only that part of the United States "*not* within any State" shall be deemed Indian country. Compare first sections of the acts of 1796, 1799, & 1802 with that of 1834 (1 Stats., p. 469, § 1; pp. 743–4, § 1, and 2 Stats., 139–141; and 4 Stats., 729, § 1). No boundary-line was indicated by the first or any other section of the act of March 1, 1793 (1 Stats., 329–332).

Again: The fourth section of the act of 1793, and of every succeeding act down to that of 1834, denounced a punishment upon every citizen, inhabitant, or person resident—that of 1793 using the word "inhabitant," and the later acts the other phrase—who "shall go into any *town, settlement, or territory* belonging to *any* nation or tribe of Indians and there commit" the offenses named. By the corresponding section (§ 16) of the act of 1834 (4 Stats., 731, now found in Revised Statutes, § 2154, printed *supra* (the penalty is inflicted only upon any "*white* person" (instead of "inhabitant" or "resident") who shall commit crime "*within the Indian country*," instead of in any Indian "*town, settlement*, or territory." These changes of phraseology were not accidental, capricious, nor merely syntactic. They evidenced a deliberate purpose. They were made to carry out a political idea which had long agitated some of the Southern States, especially Georgia.

The cry then was, "The Cherokees must go!"

December 20, 1828, December 19, 1829, and December 22, 1830, laws were passed in that State to annex the Cherokee territory to certain counties, and to extend over it the civil and criminal jurisdiction of the State,

preventing the enforcement of Cherokee laws therein, and subjecting to capital punishment as murderers all those who inflicted the penalty of death upon persons capitally convicted under those laws. (See 5 Peters, original edition, pp. 6 and 7.) Many other similar laws were passed in the succeeding years, as will be seen by reference to this and the next volume of Peters's reports.

In carrying out this legislation, a man convicted in a county court of murder in the Cherokee territory was hung, pending a writ of error to this court; both branches of the Georgia legislature voting that the Supreme Court of the United States had no jurisdiction to issue the writ.

The court held, in the case of the Cherokee Nation *v.* Georgia (5 Peters, 1–81), that the nation, as such, was not a foreign state, so as to be able to seek redress against the State in the Federal tribunals.

But in Worcester *v.* Georgia (6 Peters, 515–596) it was declared that the legislation above referred to was unconstitutional.

The Georgia acts of December 19, 1829, and of December 22, 1830, are fully recited in the report of this case in the original edition of 6 Peters, pp. 515 to 528.

It is a part of the history of those times and local troubles that, although the Cherokees had become sufficiently civilized to hold slaves themselves, yet it was complained against them, justly or otherwise, that they harbored fugitive slaves of white masters and also free negroes.

The difficulty between Georgia and the Creeks, culminating in war, upon the issues arising out of the refusal of those Indians to return fugitive slaves and their descendants, is a sad incident of our history.

For these reasons, their settlements were no longer protected by the legislation under consideration; and then United States refused to make good any depredations by negroes, in order that the Indians might have the greater inducement to exclude this race from their settlements and country, and to go into the Indian Territory. The purpose was to prevent a conflict between the white and red races; the blacks were only to be protected by remaining among the whites. The color line was purposely, distinctly, definitely drawn. Red and black were considered only in subordination to the interests of the white race.

The original legislation protected the Indian against loss inflicted by a citizen, inhabitant, or resident of the United States; and such person against Indian depredations. (See statutes cited *supra*.) Though the negro, free or bond, was not a citizen (Dred Scott *v.* Sanford, 19 Howard 393), yet he was an inhabitant of or resident in the country; so the phraseology of the law was changed in 1834 to exclude him from its protection against Indian depredations or revenge. Because they were not citizens, and were mostly chattles, it was thought improper to make any reclamation against the Indian Nations for injuries to these beings. It was chiefly to guaranty against the violence of citizens (or those owing allegiance, at least) on each side that these provisions were put into the statutes. (Opinion of H. S. Legaré, 4 Atty. Gen. Ops., 72.)

II.

A different construction cannot now be given Revised Statutes, sec. 2154–5, from what would, at that time, have been given to the act of June 20, 1834, simply

because the court may think the same reasons are no longer operative.

The maxim, *Cessante ratione legis cessat ipsa lex*, has never been applied to statutes—certainly not to recent statutes. It is for Congress to say when circumstances have so changed as to require new legislation upon the subject. There has been no change since Congress again adopted this law by the passage of the Revised Statutes.

This is a legislative declaration that the act of June 30, 1834, is and from its approval ever has been in force in the precise terms and meaning which it originally bore. That it is in force is not questioned, but maintained since it is the only basis for the claim presented. There is no *implied* contract; no reason, except political, why the United States should bear the loss consequent upon a theft or robbery perpetrated upon an Indian any more than by one white upon another; and it is for Congress to determine when, how, and to what extent governmental policy is to be changed. In the meantime, the right being purely statutory, a claimant, to entitle himself to judgment, must bring himself clearly within the strict terms of the statute.

It is just to add that the attention of the Court of Claims was not invited to the statutes anterior to 1834, nor to the history of the times when this act was debated, enacted, and approved.

CHARLES DEVENS,
Attorney-General.
EDWIN B. SMITH,
Assistant Attorney-General.

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Supreme Court of the United States.

No. 153.

THE UNITED STATES, APPELLANTS,

vs.

SANDFORD PERRYMAN.

Appeal from the Court of Claims.

APPELLEE'S BRIEF.

R. S. DAVIS,
Attorney for Appellee.

Judd & Detweiler, Printers.

Supreme Court of the United States.

No. 153.

THE UNITED STATES, APPELLANTS,

vs.

SANDFORD PERRYMAN.

Appeal from the Court of Claims.

APPELLEE'S BRIEF.

This is an appeal from the Court of Claims; and the sole question to be determined in this Court is the question of color. The court below was divided on that question; and entered judgment for the appellee in the sum of $345. From this judgment the Attorney General appealed.

Section 2154 of the Revised Statutes provides that: "Whenever in the commission, by a *white person* of any crime, offence, or misdemeanor, within the Indian country, the property of any friendly Indian is taken, injured, or destroyed, and a conviction is had for such crime, offence, or misdemeanor," &c.

Section 2155 provides the modes of payment.

The appellee insists that under the first clause of the fourteenth amendment to the Constitution of the United States, the courts shall only inquire as to citizenship, and not as to the color of men's skins in judicial proceeding.

The fifteenth amendment would seem to be conclusive on this subject.

In addition to these amendments to the Constitution, we have several acts of Congress, which would seem to clearly indicate the legislative will on this subject.

By the act approved July 12th, 1862, section 5 provides: "That in all judicial proceeding in the District of Columbia there shall be no exclusion of any witness on account of color." (12 Stat., 539.)

The act of March 3d, 1865, 13 Stat., 515, removes all disqualification of color in carrying the mails.

By the act approved January 24th, 1867, 14 Stat., 379, Congress abolished color in all the Territories as a qualification to vote.

It is, therefore, plain—and it seems to us, beyond controversy—that these amendments to the Constitution, and these several legislative enactments, indicate the will of the American people, as thus expressed; that the time has come when this odious discrimination, on account of color, should be wiped for ever out. No matter with what solemnities he may have been devoted upon the altar of slavery he is now an American citizen and a free man; and the altar and the god has sunk together in the dust; and he stands redeemed, regenerated, and disenthralled, by the irresistible genius of universal emancipation in these United States.

R. S. DAVIS,
Attorney for Appellee.